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In the Supreme Court
of the United States

OCTOBER TERM, 1971

No. 72-5052

ROBERT COX, on his own behalf and for others similarly situated,

Petitioner,

v.

DONALD I. McNAMARA, Chief of Portland Police Bureau; Portland Police Association, and City of Portland, Oregon,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OREGON

STATEMENT OF THE CASE

The Portland Police Association (hereinafter referred to as Assn.) was and is the exclusive bargaining agent for all sworn police personnel of the City of Portland (hereinafter referred to as City), except the Chief, Deputy Chief and Inspector (Supp. App. 8.)

On October 1, 1969, pursuant to Oregon Revised Statute 243.751, the Oregon Public Employees Relation Board appointed a fact-finding committee to assist in the settlement of a labor dispute then existing between the City and the Assn. (Supp. App. 8).

On December 2, 1969, based upon the testimony of witnesses and exhibits received in its hearings, the fact-finding committee issued its "Report of Fact Finding Committee" which included an opinion:

> "The case against moonlighting provided by the testimony presented . . . is strong enough to warrant an additional measure . . . namely, the promulgation of suitable rules and regulations to in this way require the phasing out of moonlighting." (Supp. App. 10).

On December 9, 1969, the members of the Assn. accepted the recommendations contained in the "Report of Fact Finding Committee," including the recommendation to phase out moonlighting, by a vote of 536 to 11 (Supp. App. 14).

On January 29, 1970, after negotiations between the City and the Assn., a tentative agreement was reached which included:

> "The present practice of Portland Police Officers working at various jobs in addition to their police bureau employment is not desirable. Therefore, the Portland Police Association's suggestion for phasing out moonlighting . . . shall be implemented over a six month period beginning at the date of agreement by the parties." (Supp. App. 14).

On February 3, 1970, the members of the Assn. accepted the tentative agreement, including the phasing out of moonlighting by a vote of 590 to 39 (Supp. App. 14).

On February 13, 1970, the tentative agreement became an executed Contract between the City and the Assn. (Supp. App. 15).

On April 2, 1970, the City passed Section 3.20.160 of Title 3, Administration, of the Code of the City of Portland, Oregon, which provides:

> "The Chief of Police shall have authority, subject to the approval of the Commissioner in charge, to issue such administrative rules and regulations . . . as are necessary to govern the conduct of the members of the Bureau of Police, and to provide for the adequate functioning of the Bureau" (Supp. App. 15).

On June 4, 1970, the Chief of Police issued general order No. 12, the order here in question, which prohibited the off-duty employment of police officers, subject to certain exceptions (App. 4).

The petitioner filed a suit seeking declaratory and injunctive relief from operation of General Order No. 12, alleging it conflicted with the City Charter and Ordinances, the Oregon Constitution, and the Constitution of the United States (App. 12, 13).

The petitioner appealed to the Court of Appeals of the State of Oregon from an adverse decree (App. 5-12, plus Judgment and Decree of the Circuit Court of the State of Oregon for the County of Multnomah).

The Court of Appeals of the State of Oregon affirmed the trial court, holding that a regulation absolutely prohibiting the off-duty employment of police personnel is constitutionally permissible and that the exceptions contained in the General Order are reasonable and not inconsistent with proper and effective internal police administration (App. 1-4).

SUMMARY OF ARGUMENT

Neither the facts herein, nor the applicable law support petitioner's request for a Writ of Certiorari.

ARGUMENT

Municipalities and County governments may set out proper regulations as to the conduct of policemen, firemen, and other employees, it being held that such regulation is necessary to secure efficient, mentally and physically alert organizations for the protection of the public at large. Pursuant to this general rule, regulations forbidding or regulating outside occupations of policemen or firemen have usually been sustained as valid, the courts generally taking the view that the duties of such officers are peculiarly connected with the public health and safety, so that it is particularly important that they not be subject to outside interests which might conflict with their official duties by diluting their energies, occupying time during which they are at least potentially on call, or involving themselves in situations where they might be motivated to neglect or subvert their official functions. 88 A.L.R.2d 1235.

From the very inception of the ban on off-duty employment herein, the "Report of Fact Finding Committee," the purpose behind the ban has been to improve the overall function of the Police Bureau (Supp. App. 10).

It was held by the trial court to be reasonable (App. 7), not discriminatory (App. 8), and validly established (App. 10).

It was held by the Appellate Court to be constitutionally permissible (App. 2), containing reasonable classifications (App. 3), and consistent with proper and effective internal police administration (App. 3).

The case of *Railroad Trainmen* v. *Howard*, 343 U.S. 768, 72 S. Ct. 1022, 96 L. Ed. 1283 (1952), cited by petitioner, held invalid a collective bargaining contract that had the effect of taking jobs away from train porters solely because of their race. With the holding of this case the respondents agree, but submit it is far afield from the facts and classifications involved in the case at hand.

The case of *Printz Leather Co., Inc.*, 94 N.L.R.B. 1312 (1951), cited by petitioner, held invalid a discharge from private employment by reason of the employee's refusal to cooperate in the concerted effort of the other employees and the Union to limit production, and the Union's hence demand for his discharge. This case supports a discriminatory discharge attack for a case containing similar facts, but again, goes far afield from the facts and classifications involved in the case at hand.

Cafero v. *NLRB*, 336 F.2d 115 (2 Cir. 1964), held that a union member, who, at the Union insistence, was dropped to the bottom of the employer's seniority list after it had been discovered that he had been employed fulltime in another occupation for the previous 13 years, in violation of a collective bargaining agreement, failed to prove that the Union had arbitrarily or capriciously discriminated against him. This case appears to hinder rather than to help petitioner's cause herein.

CONCLUSION

Based upon the legal authority in support of the judgments below, and the lack of support, both factually and legally, for the petitioner's petition, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

LYNDON A. S. WILSON, JR.
Counsel for Portland Police Association

By _____

MARIAN C. RUSHING
RICHARD A. BRAMAN
Counsel for Donald I. McNamara
and City of Portland

By _____

SUPPLEMENTAL APPENDIX

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH

ROBERT COX, on his own behalf and for others similarly situated, Plaintiff, vs. DONALD I. McNAMARA, Chief of Portland Police Bureau, PORTLAND POLICE ASSOCIATION, and CITY OF PORTLAND, OREGON, Defendants.	No. 363 672 ANSWER

In answer to the Complaint on file herein, defendants allege as follows:

I

Admit that plaintiff is a member of the Portland Bureau of Police; admit that on or about June 4, 1970, defendant McNamara, Chief of the Portland Bureau of Police, issued 1970 Memo-G.O. #12, a copy of which is annexed to and made a part of plaintiff's Complaint; admit that on or about June 19, 1970, defendant McNamara mailed a letter to Hyster Company, a copy of which is annexed to and made a part of plaintiff's Complaint; and except as so admitted, deny each and every allegation, matter and thing contained in said Complaint.

As an AFFIRMATIVE DEFENSE defendants allege:

I

Defendant City of Portland is existing and duly

incorporated and organized under the laws of the State of Oregon, and defendant McNamara is, and at all times mentioned herein was, serving as Chief of Police of said city.

II

Defendant Portland Police Association is affiliated with the International Brotherhood of Police Officers and is, and at all times mentioned herein was, duly recognized and acting as exclusive bargaining agent for all sworn police personnel of said city, except the Chief, Deputy Chief and Inspector.

III

On October 1, 1969, pursuant to ORS 243.751, the Oregon Public Employe Relations Board appointed a fact-finding committee to assist in the settlement of a labor dispute then existing between defendant City and defendant Association. Based upon the testimony of witnesses and exhibits received in its hearings, said committee on December 2, 1969, issued its "Report of Fact Finding Committee," which includes, at pages 41 through 43, the following:

> "*A Note regarding 'Moonlighting'*
>
> "It is common knowledge that Portland police officers engage in wide-scale moonlighting—that is, when off duty, work at various other jobs. It is difficult precisely to determine the amount of such off-duty employment. However, the extent of this practice is suggested by an exhibit submitted to the Committee which listed 200 Portland businesses employing off-duty police officers in their capacity as police officers. Off-duty

police officers work and obtain employment in various other capacities as well.

"The PPA strongly is of the opinion that moonlighting should be substantially eliminated by a suitable phasing-out program (Attachment No. 1 to this opinion). A city exhibit submitted to this Committee indicates that Mayor Terry D. Schrunk and the Chief of Police Donald McNamara agree that:

> 'The present practice of Portland police officers working at various jobs in addition to their Police Bureau employment is not desirable. Such moonlighting is certain to have an effect on the ability of the individual officer to perform his regular police assignment. In addition, the nature of this outside work may adversely effect [sic] the attitude of the public toward the police profession and create public relations problems for the Bureau. It is gratifying to have the Portland Police Association on record as opposing moonlighting.'

"Virtually every witness who came before this Committee agreed with the positions adduced foregoing—namely, that moonlighting was deleterious to the overall function of the Police Bureau and should be discontinued.

"There are various reasons for urging that moonlighting be discontinued. In addition to points such as those suggested foregoing, the Committee feels it important to draw attention to the fact that the police officer is, in a real sense, 'on duty' 24 hours per day. This is true in the sense that the off-duty police officer is required to re-

spond at any time to a call from his Chief to return to duty. This is also true in the sense that the off-duty police officer has an affirmative obligation to intervene in his official capacity as a police officer, in those instances in which he may confront unlawful activity of a potentially serious character. Generally, these obligations are such as to require that the police officer regard himself as a 24-hour a day police professional. More particularly, these obligations are such as to suggest the strong possibility of conflicts of roles and functions arising in the context of outside employment — particularly in those instances in which such employment is as a police officer.

"As earlier indicated, the Committee believes that the compensation package recommended by it will provide sufficient incentive substantially to eliminate moonlighting. However, in the opinion of the Committee, the case against moonlighting provided by the testimony presented to it is strong enough to warrant an additional measure —namely, the promulgation of suitable rules and regulations to in this way require the phasing-out of moonlighting.

"In the ways and for the reasons suggested foregoing, the City of Portland should benefit substantially in terms of improved effectiveness of Police Bureau operations from the elimination of moonlighting.

"There is an additional aspect of this matter which should be made explicit. The past practice of compensating overtime by compensatory time off has resulted in a considerable amount of paid time lost to the department. City Personnel Offi-

cer, Robert Johnson, determined that in the period from September 28, 1967 through November 22, 1967 the amount of paid time loss on this account was 3.47 hours per 80-hour pay period per man. This time loss amounts to about 4.6 percent of the hours worked. If paid overtime recovered this time loss, it would, for a police force of the present size, increase the effective size of the force by about 35 men.

"There is yet another related aspect of this matter. There is now a considerable day-to-day variance throughout the month (and on each shift) in the percentage of police officers on duty (see Exhibit No. 11). Some of this is due to such factors as vacations and sick leave. However, a good part of this variance is ascribed to the practice of giving compensatory time off in lieu of paid overtime. There is thus good reason to believe that paid overtime will result in considerably less unevenness in the daily level of police service afforded in Portland. In these ways, too, then, the results to follow from the compensation package recommended by the Committee should be of substantial benefit to the citizens of Portland.

"With respect to the provision contemplating payment of overtime for all personnel, the Committee recommends that the parties should attend to the promulgation of regulations sufficient to control the potential for abuse."

Under the "Summary of Recommendations" at page 46 of said report is the following:

"*Overtime Compensation and 'Moonlighting'*

"The Committee recommends that all overtime

be paid at time and one-half beginning 1/1/70 to 6/30/70 and that all overtime be paid at the same rate during the following fiscal year and contract period—7/1-/70 to 6/30/71. This would mean discontinuing the practice of compensating for overtime by compensatory time off.

"It is the recommendation of the Committee that Command personnel be included within the provision for payment for overtime service.

"The Committee recommends that the phasing out of 'moonlighting' be begun on 1/1/70 in accord with the plan proposed by the PPA, or some similar plan mutually agreed to by the parties. The PPA plan appears as Attachment No. 1 to this opinion."

Included in said report at page 50 and designated "Attachment No. 1" is the following:

"*Association Proposal Re: Moonlighting*

"That moonlighting be phased out over a six-month period pursuant to a proposed regulation as it appears below.

Extra Employment of Sworn Members. Members are permitted, without specific approval of the Chief of Police, to make investments, rent their own property to others (unless a business license is required), and enter into partnerships which are operated exclusively by others, provided that such investment, rental or partnership does not and is not likely to jeopardize the reputation of the member of the Bureau of Police.

Members are prohibited from engaging in

any work, occupation, profession, business, partnership, self-employment or management of others' properties.

Exceptions:

(1) Members may teach law enforcement subjects at accredited institutions of higher learning, with the approval of the Chief of Police.

(2) Other employment which is designated to improve the police image will be permitted, with approval of the Chief of Police.

(3) Members shall be permitted to continue working under authority of extra employment permits issued prior to the effective date of this order. Such permits, however, will not be renewed beyond six months from the effective date of this order. Hardship cases may be extended an additional six months. A complete financial statement will be required to establish cases of hardship.

(4) Members who, on the effective date of this order, are operating businesses or engaged in any other activities prohibited by this order, will be given six months to comply. An extension of six months will be granted provided that a detailed report indicates that all reasonable efforts have been made to disengage in such activity."

IV

On December 9, 1969, members of defendant Asso-

ciation accepted the recommendations contained in said "Report of Fact Finding Committee," including the recommendation alleged in paragraph III hereof, by a vote of 536 to 11.

V

After December 9, 1969, negotiators representing defendant City and defendant Association negotiated and tentatively agreed upon certain terms that on January 29, 1970, were reduced to a writing entitled "Memorandum of Agreement," which included the following clause:

> "The present practice of Portland police officers working at various jobs in addition to their Police Bureau employment is not desirable. Therefore, the Portland Police Association's suggestion for phasing out moonlighting (Attachment No. 1 of the Fact Find [sic] Committee Report) shall be implemented over a six-months period beginning at the date of agreement by the parties. However, the City may arrange to provide police services to other governmental entities if the policemen providing said services are assigned and paid by the City."

VI

On February 3, 1970, members of defendant Association accepted the "Memorandum of Agreement" alleged in paragraph V hereof by a vote of 590 to 39.

VII

At its regular public session on February 13, 1970, the City Council of defendant City passed Ordinance No. 130430, entitled "An Ordinance authorizing and directing the City Council Negotiating Team, Terry

D. Schrunk and Stanley W. Earl, to execute a Memorandum of Agreement with the Portland Police Association, relating to terms and conditions of employment in the Bureau of Police, and declaring an emergency." A certified copy of said ordinance is attached hereto and by this reference made a part hereof. The "Memorandum of Agreement" attached as Exhibit "A" to, and by reference made a part of, said ordinance is the "Memorandum of Agreement" alleged in paragraph V hereof.

VIII

On February 13, 1970, following the City Council meeting alleged in paragraph VII hereof, the "Memorandum of Agreement" alleged in paragraph V hereof was executed by negotiators representing defendant City and defendant Association. Said memorandum has been designated by the City Auditor as Contract No. 12773.

IX

Section 3.20.160 of Title 3, Administration, of the Code of the City of Portland, Oregon, passed by the Council April 2, 1970, provides as follows:

> "The chief of police shall have authority, subject to the approval of the commissioner in charge, to issue such administrative rules and regulations in addition to those embodied in the Charter and this code, as are necessary to govern the conduct of the members of the bureau of police, and to provide for the adequate functioning of the bureau."

X

On June 4, 1970, defendant McNamara issued the general order alleged in, and made a part of, plaintiff's complaint, incorporating the provisions of the defendant Association's suggestion for phasing out moonlighting referred to in the said "Memorandum of Agreement" executed February 13, 1970.

WHEREFORE, defendants pray for a decree:

1. Denying the relief sought by plaintiff herein;

2. Declaring the general order alleged in, and made a part of, plaintiff's complaint herein to be in all respects valid and enforceable as to plaintiff and others similarly situated;

3. Declaring that plaintiff and others similarly situated are estopped to deny that said general order is in all respects valid and enforceable; and

4. For such other and further relief as to the Court may seem just.

/s/ *Richard A. Braman*
RICHARD A. BRAMAN
Of Attorneys for Defendants
McNamara and City of Portland

/s/ *Lyndon A. S. Wilson, Jr.*
LYNDON A. S. WILSON, JR.
Attorney for Defendant
Portland Police Association